

DEPARTMENT OF HEALTH AND MENTAL HYGIENE
BOARD OF HEALTH

NOTICE OF ADOPTION OF AN AMENDMENT (§81.50)
TO ARTICLE 81 OF THE NEW YORK CITY HEALTH CODE

In compliance with §1043(b) of the New York City Charter (the “Charter”), and pursuant to the authority granted to the Board of Health by §558 of said Charter, a Notice of Intention to amend Article 81 of the New York City Health Code, adding a new §81.50, was published in the City Record on September 29, 2006, and a public hearing was held on October 30, 2006. More than 2,200 written and oral comments were received, including testimony from 45 persons who testified at the public hearing. At its meeting on December 5, 2006, the Board of Health adopted the following resolution.

STATUTORY AUTHORITY

This amendment to the Health Code is promulgated pursuant to §§558 and 1043 of the Charter. Section 558(b) and (c) of the Charter empowers the Board of Health to amend the Health Code and to include in the Health Code all matters to which the Department’s authority extends. Section 1043 grants the Department rule-making authority.

STATEMENT OF BASIS AND PURPOSE

The Department of Health and Mental Hygiene (the “Department”) enforces provisions of the New York City Health Code (“Health Code”) and other applicable law relating to food served directly to the consumer throughout the City, including food that is commercially prepared, and sold or distributed for free, by food service establishments, a broad category which includes restaurants, caterers and mobile food vending units. The Department also regulates non-retail food processing establishments, such as mobile food vending commissaries, as defined in Health Code §89.01, which supply food for mobile vending units.

Background

Restaurants (the term is being used interchangeably with “food service establishments” or “FSEs”) are an important source of daily food intake for New York City residents: an estimated one third of daily caloric intake comes from foods purchased outside of the home.¹ Assuring safe and healthy dining options is a public health priority. The Department issues permits and inspects all New York City FSEs and non-retail food processing establishments, as defined in §81.03(j) and (p) of the Health Code. Although federally mandated nutrition labeling on food products for sale in supermarkets facilitates informed choice, consumers lack such essential information to make healthy choices when eating in restaurants. Calorie information, if provided at the time of food selection, would allow New Yorkers to make more informed choices. Accordingly, Article 81 of the New York City Health Code is being amended to require that information on calorie content values of menu items be available to patrons of FSEs at the time of ordering when such information is otherwise made publicly available by or on behalf of the FSEs.

The Department is charged with preventing and controlling diseases, including chronic disease, through approaches that may address individual behavior or the community environment. By requiring posting of available information concerning restaurant menu item calorie content, so that such information is accessible at the time of ordering, this Health Code amendment will allow individuals to make more informed choices that can decrease their risk for the negative health effects of overweight and obesity associated with excessive calorie intake.

Obesity is epidemic

According to measured height and weight data from the National Health and Nutrition Examination Survey (NHANES), the obesity rate among U.S. adults more than doubled over the past three decades from 14.5% in 1971-1974 to 32.2% in 2003-2004.^{2,3} In New York City, more than half of adults are overweight and one in six is obese.⁴ Obesity begins early – 21% of New York City kindergarten children are obese.⁵ People who are overweight are at increased risk for diabetes, heart disease, stroke, high blood pressure, arthritis, and cancer. Diagnosed diabetes more than doubled over the past decade and now affects three quarters of a million New Yorkers.⁶

If rates of obesity continue to rise unabated, it has been estimated that one in three children (and half of Hispanic children) born in 2000 will develop diabetes in his or her lifetime.⁷

‘Away from Home’ food consumption increasingly fuels obesity and chronic illness

Americans are increasingly eating meals away from home. In 1970, Americans spent 26% of their food dollars on foods prepared outside their homes while by 2006 they spent almost half (48%) of their food dollars eating out.⁸ As previously noted, the average American consumes about one third of calories from foods from restaurants.⁹ Children eat almost twice as many calories when they eat out than when they eat at home.¹⁰

Nutrition labeling works and is supported by consumers and leading experts

Since 1994, the federal Nutrition Labeling and Education Act (NLEA) has made nutrition information available to consumers on packaged foods purchased in retail stores. This information is widely used. Three-quarters of American adults report using food labels,¹¹ and about half (48%) report that nutrition information on food labels has caused them to change their food purchasing habits.¹² However, NLEA explicitly exempts restaurants from nutrition labeling requirements, and at most restaurants, people can only guess the nutrient content of foods at the point of purchase. Current voluntary attempts by some food service establishments to make available nutrition information are inadequate particularly because the information is usually not displayed where consumers are making their choices and purchases. When FSEs’ nutrition information is available on the internet, patrons need to have access to off-site websites. Such information may also be available in brochures, on placemats covered with food items, or on food wrappers, where the information is hard to find or difficult to read and only accessible after the purchase is made. Thus the information provided has little impact on choice.¹³

Without calorie information, it is difficult for consumers to compare options and make informed decisions. People do not accurately guess the calorie content of foods and beverages, and calorie information will help guide food choices. Recent studies found that 9 out of 10 people underestimated the calorie content of less-healthy items by an average of more than 600 calories (almost 50% less than the actual calorie content).¹⁴ When calorie information was provided on food items, consumers chose high-calorie items 24% to 37% less often.

Additional marketing research has shown that providing nutrition information affects consumer attitudes and purchasing intentions. Consumers consistently underestimate the nutrient levels in food items and overestimate the healthfulness of restaurant items.¹⁵ When consumers are made aware of nutrition information at the point of purchase, disease risk perceptions increase, attitudes toward the product change, and purchasing intentions for unhealthy products decrease.^{16,17} Presenting nutrition information on restaurant menus empowers consumers and influences food choices.¹⁸

Studies consistently show that consumers would like to have this information. Six nationally representative polls have found that between 62% to 87% of Americans support requiring restaurants to list nutrition information.^{19,20}

A key recommendation of a recent Food and Drug Administration-sponsored expert group report on obesity and eating away from the home was that, “Away-from-home food establishments should provide consumers with calorie information in a standard format that is easily accessible and easy to use. Participants believe that information should be provided in a manner that is easy for consumers to see and use as part of their purchasing and eating decisions. Information should be provided for any standard menu item offered on a regular and ongoing basis that is prepared from a standardized recipe, whether the item is an entire meal or a meal component. Non-standard items, including daily specials and experimental items, may be exempted. Information should be provided for the standard menu item as usually offered for sale (i.e., the base product, in the portion size as offered for sale), since most means of providing information cannot easily account for changes due to customization and special orders.”²¹

Changes to Health Code to require calorie labeling

New York City needs to address the rapidly growing twin epidemics of obesity and diabetes. Calorie labeling is a public health intervention to help address these problems. Providing simple, point-of-purchase calorie information would allow consumers to make more informed food choices in restaurants just as they currently can in supermarkets.

As amended, Health Code §81.50 requires FSEs that make calorie information for standardized menu items publicly available (published by or on behalf of the FSE) on or after March 1, 2007, to post such calorie (kcal) information on menu boards and menus, next to each menu item (Figure 1). Of course, in order for the calorie information to be accurate, such a requirement can only be implemented for food items that are standardized with regard to portion size, formulation, and ingredients. Therefore, it is expected that the proposal would apply only to the approximately 10% of New York City food service establishments that serve food menu items in portions that are standardized for size and content and currently post calorie information on these items. Posting of calorie content information will be required for any menu items for which calorie content has been made publicly available. Calorie amounts shall be posted in a size and typeface at least as large as the price or name of the menu item. This provision does not require any FSE to engage in analysis of the nutrition content of its menu items, but does require restaurants that make such information publicly available to their customers to post it in plain sight, so it is available at the time of ordering. By doing so, these FSEs will enable New Yorkers to have the information they need to make more informed choices.

MENU	Calories	Price
HAMBURGER	280	.89
CHEESEBURGER	330	.99
FISH FILET	470	1.99
CRUNCHY CHICKEN	550	2.79
4 OZ HAMBURGER	430	2.29
EXTRA BIG HAMBURGER	540	2.29
BIG BIG BURGER	590	2.39
GRILLED CHICKEN	450	2.89
8 OZ BURGER	760	2.99

FIGURE 1: Example of Menu Board with Calorie Labeling²²

Only FSEs that make nutritional information publicly available on or after March 1, 2007, such as in brochures, signage, websites, or other means, will be required to post calorie information. Posted calorie content information will be calculated in accordance with 21 CFR §101.9(c)(1)(i) or its successor regulation. FSEs would not be precluded from providing additional nutrition information voluntarily.

The Department's restaurant inspectors would be responsible for enforcing the requirement that nutrition information is provided on menu boards and menus.

Changes made in response to public comments

Substantial support was received for the proposal in written comments and oral testimony. Of the approximately 2,200 written and oral comments received, all but 22 supported the amendment. The proposal has been further amended in response to the comments and for clarity. To clearly identify the number of calories displayed, as in Figure 1, above, FSEs will be required to place the word "calories" or "cal" as a heading above the column listing the number of calories, or adjacent to the calorie content value for each menu item. In response to comments that requiring display of the median calorie content value for menu items offered in a range of flavors or varieties could be confusing, the proposal has been amended so that FSEs will now be required to display the range (minimum to maximum) of calories applicable to all flavors or varieties rather than calculating the median number of calories for the menu item. Finally, FSEs will also be allowed to exercise flexibility in how they display calorie information at the point of purchase, subject to the Department's prior approval.

STATEMENT PURSUANT TO SECTION 1042 – REGULATORY AGENDA

The proposed amendment was not included in the Department's Regulatory Agenda because it resulted from a recent analysis by the Department.

The proposal is as follows:

Note-matter in brackets [] to be deleted

Matter underlined is new

RESOLVED, that Article 81 of the New York City Health Code, set forth in title 24 of the Rules of the City of New York, as last amended by resolution adopted on the seventh of June, two thousand five, be, and the same hereby is further amended, to add a new section 81.50, to be printed with explanatory notes, as follows:

§81.50 Calorie labeling.

(a) Scope and applicability. This section shall apply to menu items that are served in portions the size and content of which are standardized and for which calorie content information is made publicly available on or after March 1, 2007, by or on behalf of the food service establishment serving the items.

(b) Calorie information for menu items. Food service establishments shall post on menu boards and menus the calorie content values (in kcal) that have been made publicly available as specified in subdivision (a) for each menu item next to the listing of each menu item. Posted calorie content shall be calculated in accordance with 21 CFR §101.9(c)(1)(i) or its successor regulation. Subject to prior approval by the Department, food service establishments may use alternative means for making calorie

information available to patrons, provided such information is made available at the point of purchase and is at least as prominent as required in paragraph (1) below.

(1) *Menu boards and menus.* The term “calories” or “cal” shall appear as a heading above a column listing the calorie content value of each menu item, or adjacent to the calorie content value for each menu item, in the same or larger typeface as the calorie content values for individual menu items.

(A) *Menu boards.* On menu boards, calorie content values shall be posted in a size and typeface at least as large as the name of the menu item or price, whichever is larger.

(B) *Menus.* On printed menus, calorie content values shall be legible and shall be printed in a size and typeface at least as large as the name or price of the menu item.

(2) *Range of calorie content values for different flavors and varieties.* For menu items that come in different flavors and varieties but that are listed as a single menu item, including, but not limited to, beverages, ice cream, pizza or doughnuts, the range of calorie content values showing the minimum to maximum numbers of calories for all flavors or varieties of that item shall be listed on menu boards and menus for each size offered for sale.

(c) *Effective date.* This section shall take effect on July 1, 2007.

Notes: Section 81.50 was added by resolution adopted on December 5, 2006 to require that food service establishments in New York City that sell food items whose portion size and content are standardized prominently display publicly available information about the calorie content of such items on menu boards and menus in an effort to facilitate patrons' nutritional choices at time of purchase.

RESOLVED, that the list of Section Headings in Article 81 of the New York City Health Code, set forth in title 24 of the Rules of the City of New York, as amended by resolution adopted on the seventh of June, two thousand five, be, and the same hereby is, further amended, to be printed together with explanatory notes, as follows:

ARTICLE 81

FOOD PREPARATION AND FOOD ESTABLISHMENTS

* * *

§81.49 Modification by Commissioner.

§81.50 Calorie labeling.

* * *

§81.51 Examination of most recent inspection report by patron or customer; posting sign.

Notes: The Table of Section Headings was further amended when a new §81.50 was added by resolution adopted on December 5, 2006 to require that food service establishments in New York City that sell food items whose portion size and content are standardized prominently display publicly available information about the calorie content of such items on menu boards and menus in an effort to facilitate patrons' nutritional choices at time of purchase.

¹ Guthrie JF. et al. Role of Food Prepared Away from Home in the American Diet, 1977-78 Versus 1994-96: Changes and Consequences. *Society for Nutrition Education* 2002; 34:140-150.

² Flegal KM, Carroll MD, Ogden CL, Johnson CL. Prevalence and trends in obesity among U.S. adults, 1999-2000. *JAMA* 2002; 288:1723-1727.

³ Ogden CL, Carroll MD, Curtin LR, McDowell MA, Tabak CJ, Flegal KM. Prevalence of overweight and obesity in the United States, 1999-2004. *JAMA* 2006; 295:1549-1555.

⁴ "One in 6 New York City Adults is Obese." *NYC Vital Signs*. NYCDOHMH. 2003. 2(7).

⁵ "Obesity in Early Childhood: More than 40% of Head Start Children in NYC are Overweight or Obese." *NYC Vital Signs*. NYCDOHMH. 2006. 5(2).

⁶ Thorpe LE, Mostashari F, Berger DK, Cobb LK, Helgerson SD, Frieden TR. Diabetes is Epidemic. *NYC Vital Signs*. NYCDOHMH. 2003;2(1).

⁷ Narayan KM, Boyle JP, Thompson TJ, Sorensen SW, Williamson DF. Lifetime Risk for Diabetes Mellitus in the United States. *Journal of the American Medical Association*. 2003. 290: 1884-1890.

⁸ National Restaurant Association (NRA). "Industry at a Glance." 2005.

⁹ Guthrie JF. et al. Role of Food Prepared Away from Home in the American Diet, 1977-78 Versus 1994-96: Changes and Consequences. *Society for Nutrition Education* 2002; 34:140-150.

¹⁰ Zoumas-Morse C. et al. Children's Patterns of Macronutrient Intake and Associations with Restaurant and Home Eating" *Journal of the American Dietetic Association* 2001. 101:923-925.

¹¹ US Department of Health and Human Services (US DHHS), Centers for Disease Control and Prevention, National Center for Health Statistics. *Healthy People 2000 Final Review*. 2001.

¹² Levy AS, Derby BM. The Impact of NLEA on Consumers: Recent Findings from FDA's Food Label and Nutrition Tracking System. Washington DC: Center for Food Safety and Applied Nutrition. Food and Drug Administration. 1996.

¹³ Support for Nutrition Labeling in Fast Food and Other Chain Restaurants. *American Journal of Public Health*. Policy Statements. November 9, 2004. P. 28-29. URL: <http://www.apha.org/legislative/policy/2004/2004-14.pdf>

¹⁴ Burton S, Creyer EH. et al. Attacking the obesity epidemic: the potential health benefits of providing nutrition information in restaurants. *Am J Public Health*. 2006; 96(9):1669-1675.

¹⁵ Burton S, Creyer EH. What consumers don't know can hurt them: Consumer evaluations and disease risk perceptions of restaurant menu items. *The Journal of Consumer Affairs*. 2004; 38(1):121-145.

¹⁶ Burton S, Creyer EH. What consumers don't know can hurt them: Consumer evaluations and disease risk perceptions of restaurant menu items. *The Journal of Consumer Affairs*. 2004; 38(1):121-145.

¹⁷ Kozup JC, Creyer EH, Burton S. Making Healthful Food Choices: The Influence of Health Claims and Nutrition Information on Consumers' Evaluations of Packaged Food Products and Restaurant Menu Items. *Journal of Marketing*. 2003; 67:19-34.

¹⁸ Burton S, Creyer EH. What consumers don't know can hurt them: Consumer evaluations and disease risk perceptions of restaurant menu items. *The Journal of Consumer Affairs*. 2004; 38(1):121-145.

¹⁹ Center for Science in the Public Interest. Anyone's Guess: The need for nutrition labeling at fast-food and other chain restaurants. Washington, DC: Center for Science in the Public Interest, 2003.

²⁰ Harvard Forums on Health. Obesity as a Public Health Issue: A Look at Solutions. National Poll by Lake, Snell, Perry & Associates. June 2003.

²¹ The Keystone Forum on Away-From-Home Foods: Opportunities for Preventing Weight Gain and Obesity. Final Report. *Food and Drug Administration*. May 2006. http://www.keystone.org/spp/documents/Forum_Report_FINAL_5-30-06.pdf

²² Adapted from Backstrand J, Wootan MG, Young LR, Hurley J. Fat Chance. Washington, DC: Center for Science in the Public Interest, 1997.